Supreme Court, U.S.
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IN THE

United States Supreme Court

JOHN RICHARD KNOCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question One: Whether a "partners in crime" exception applies to the adverse spousal testimony privilege and whether the Court of Appeals erroneously concluded that Knock lacked standing to challenge the district court's application of the exception.

Question Two: Whether *Apprendi*[1] error properly preserved in the District Court is "structural error" under *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246 (1991) (the question this Court explicitly left open in *U.S. v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781 (2002)).

Question Three: Whether the doctrine of "harmless error" should shield the actions of a sentencing judge who explicitly and purposely refuses to follow the law and then purports to find his own "error" in doing so "harmless."[2]

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1 *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

2 Questions two and three are also being raised by Knock's co-defendant, Albert Madrid, in his petition for certiorari to this Court.

LIST OF PARTIES

United States of America, Plaintiff

John Richard Knock, Defendant

Albert Thomas Madrid, Defendant

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The Court of Appeals for the Eleventh Circuit's Decision dated June 6, 2003 affirming the convictions and sentence imposed by the United States District Court for the Northern District of Florida on John Richard Knock and his co-defendant Albert Thomas Madrid is not published. (App. pp. 1a-11a).[3] The Court of Appeals' order denying co-defendant Madrid's Petition for Rehearing and Rehearing *En Banc* is not published. (App. pp. 12a-13a).

The District Court's entered judgment on January 31, 2001. (App. pp. 14a-23a). The district court's Order adopting the "partners in crime" exception to the adverse spousal testimony privilege dated May 24, 2000 is not published. (App. pp. 35a-41a). The district court's Order dated January 23, 2001 denying the application of *Apprendi v. New Jersey* to Knock's sentence is not unpublished. (App. pp. 24a-34a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 2003 (Case Number 01-10894-BB (11th Cir. June 6, 2003). A petition for rehearing *en banc* by co-defendant Albert Thomas Madrid was denied on July 31, 2003. The jurisdiction of this Court is invoked under Title 28, United States Code § 1254(1).

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[3] "App." refers to the Appendix herein.

STATEMENT OF THE CASE

This petition seeks review of a judgment of the United States Court of Appeals for the Eleventh Circuit ("the Court of Appeals") (App. pp. 1a-11a), affirming a judgment of the United States District Court, Northern District of Florida, Gainesville Division ("the district court") (App. pp. 14a-23a), convicting and sentencing petitioner John Richard Knock ("Knock") to life in prison for marijuana conspiracy offenses with a twenty year concurrent sentence for money laundering. The District Court had original jurisdiction under 18 U.S.C. § 3231.

On February 17, 1999, in the Northern District of Florida, Knock and others were charged in a four count superseding indictment with: (1) conspiracy to possess with intent to distribute marijuana, (2) conspiracy to import marijuana, (3) conspiracy to commit money laundering, and (4) criminal forfeiture. Knock and co-defendant, Albert Thomas Madrid, were tried together.

Three weeks before trial, the government moved to disqualify Knock's counsel Michael Kennedy ("Kennedy"), due to the following five conflicts of interest: (1) Kennedy's prior representation of unindicted coconspirator David Kaplan, (2) his prior representation of alleged co-conspirator Jeffrey Kagel, (3) that Kennedy was the subject of an undescribed FBI/IRS investigation in New Jersey, (4) Kennedy's representation of alleged coconspirator Richard Buxton, and (5) his representation of unindicted coconspirator Robert Singer. The government later added the following four potential conflicts: (6) Kennedy's prior representation of Knock's wife, Naomi Knock ("Mrs. Knock" or "Naomi"), (7) that a subpoena was served upon Kennedy

in connection with the New Jersey investigation, (8) the government intended to introduce a letter seized from Knock in French prison wherein Mrs. Knock complains that Kennedy was dishonest and greedy to demand a $2.5 million fee, and (9) the government intended to compel Mrs. Knock to testify that she paid Kennedy with proceeds of the alleged drug conspiracy.

The district court addressed the purported conflicts at two pretrial hearings. At the first hearing, conducted on September 3, 1999, the government reiterated its concern about the ongoing criminal investigation of Kennedy and it *reluctantly* revealed that it would seek to introduce Mrs. Knock's testimony that she paid part of Kennedy's seeming $2.5 million fee with proceeds of the alleged conspiracy. The government stated that "there is further evidence that I didn't intend to get into, but it will show that Ms. Knock, Naomi Knock, went to Europe and delivered cash in Europe through another individual." According to the government, the jury would likely get "distracted" by Mrs. Knock's counsel-incriminating testimony, stating that "Ms. Knock in this letter is suggesting that Mr. Kennedy is involved in the elicit (*sic*) movement of money to her, and I think it's going to make it real difficult for the jury not to get distracted by that, and I do have real concerns that that causes a conflict that can't be dealt with." Through independent counsel, Michael E. Tigar, Esq., Kennedy conceded that he should be disqualified if there was *admissible* evidence to support the government's allegations; however, neither Mrs. Knock's testimony nor the letter she wrote to her husband were admissible because Mrs. Knock was asserting her privilege against being compelled to testify against her husband. The jury, therefore, would not be distracted.

Without ruling on the admissibility of Mrs. Knock's testimony or letter, the district court denied the government's motion. It found that the "[i]nvestigation of defense counsel, without more, is insufficient to demonstrate an actual conflict of interest." The court then proceeded to conduct a *Garcia*[4] hearing, wherein it elicited Knock's waiver of the first seven *waivable* conflicts of interest described above, including possible conflicts arising from the undescribed FBI/IRS investigation of Kennedy. Mrs. Knock's incriminating testimony and letter, conflicts eight and nine, were not discussed. Instead, the court stated:

> To my knowledge, that was all that I could find, going through the file, for a basis for a conflict or a potential conflict.
>
> And if the Government's aware of anything else, or Mr. Kennedy, if you yourself know of anything you'd like to express on the record, we'll do it now.
>
> . . .

No one mentioned Mrs. Knock's testimony or letter.

At trial, the government implicated defense counsel Kennedy in the alleged conspiracy by compelling Mrs. Knock to testify and read the letter to the jury on the eleventh day of trial that he laundered drug proceeds as part payment of his seeming $2.5 million fee. The day before, another witness testified that, in the summer of 1996, Mrs. Knock gave an individual $1 million dollars in a suitcase filled with German currency for Knock's legal defense. To connect this money to Kennedy, the

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[4] *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975).

government moved to compel Mrs. Knock's testimony. To the astonishment of defense counsel, the district court granted this motion by creating a "partners in crime" exception to the adverse spousal testimony privilege. (App. pp. 35a-41a). This prompted a spirited response from Kennedy, who argued that such testimony would impugn his credibility in the jury's eyes and created an unwaivable conflict of interest, which would require a mistrial. The district court denied the mistrial request.

The jury then heard Mrs. Knock's testimony implying that she agreed to pay Kennedy a $2.5 million fee and that she had arranged for a $1 million cash transfer to him. She also accused Kennedy of being greedy, and authenticated the letter she wrote to her husband wherein she complains that Kennedy demonstrated a "lack of honesty," which is a "serious confidence and trust issue that needs to be addressed." Of course, Kennedy could not take the stand to explain any of this, nor could he cross-examine Mrs. Knock.

On the evening of May 30, 2000, the jury convicted co-defendant Madrid on conspiracy to distribute marijuana, but acquitted him of the other two counts. Although the evidence against both defendants was basically the same, the jury convicted Knock on all three counts. The likely difference was Mrs. Knock's testimony and letter. After the jury had returned its verdicts but before sentencing, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The district court rejected defendants' objections to the PSR under *Apprendi*, (App. pp. 24a-34a), and sentenced both defendants to life imprisonment with Knock receiving a concurrent twenty year sentence for money laundering.

With respect to the drug convictions, Knock was sentenced to life in prison under 21 U.S.C. § 841(b), which creates a three-tiered sentencing system for marijuana offenses based upon drug quantity. Where no quantity is specified in the indictment and determined by the jury beyond a reasonable doubt, the maximum permissible sentence is five years. *U.S. v. Allen*, 302 F.3d 1260 (11th Cir. 2002).

The district court acknowledged explicitly in its sentencing order that sentencing Knock to life was not permissible under the rule this Court announced in *Apprendi* because drug quantity had not been pled in the indictment nor proven to or found by the jury beyond reasonable doubt. (App. pp. 24a-34a). However, the district court avoided the clear requirement of the law by mischaracterizing the *Apprendi* error as having already occurred (when in fact no error had been committed at that point because no sentence had yet been imposed), then purporting to find its own "prior errors" harmless. *Id.*

Knock and Madrid's convictions and sentences were affirmed by the court of appeals on June 6, 2003. (App. pp. 1a-11a). By order dated July 31, 2003, the Court of Appeals denied Madrid's petition for rehearing and rehearing *en banc*. (App. pp. 12a-13a).

ARGUMENT

I

THIS COURT'S DECISION IN *TRAMMEL V. UNITED STATES* LEFT OPEN THE QUESTIONS OF WHETHER THE "PARTNERS IN CRIME" EXCEPTION APPLIES TO THE ADVERSE SPOUSAL TESTIMONY PRIVILEGE AND WHETHER THE DEFENDANT/NON-WITNESS SPOUSE MAY CHALLENGE THE DISTRICT COURT'S APPLICATION OF THE EXCEPTION ON APPEAL; A CIRCUIT SPLIT HAS RESULTED ON THESE ISSUES AND SHOULD BE RESOLVED BY THIS COURT

This Court's decision in *Trammel v. United States*, 445 U.S. 40 (1980), left open two important questions regarding the application and assertion of the adverse spousal testimony privilege: (1) whether a "partners in crime" exception applies to the privilege, and (2) whether the defendant/non-witness spouse has standing, *on appeal*, to challenge the district court's application of the exception. Certiorari should be granted because the courts of appeal have split in answering these questions.

The nature of the privilege and underlying social policy must be considered to understand the importance of resolving these questions. The adverse spousal testimony privilege protects a wife from being compelled to testify against her husband due to "the natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation.'" *In re Grand Jury Subpoena United States*, 755 F.2d 1022, 1028 (2d Cir. 1985) (quoting 8 Wigmore, *Evidence* § 2228 at 217)). The privilege also protects the sanctity of their marriage

from the public spectacle this would entail. *See Trammel v. United States*, 445 U.S. 40, 44 & 54 (1980); *United States v. Archer*, 733 F.2d 354, 359 (5th Cir. 1984). This privilege is distinct from the other spousal privilege, the confidential marital communications privilege, which forbids compelled disclosure of private communications between spouses. Whereas the confidential communications privilege applies to extrajudicial statements, may be invoked by either spouse, and pierced by a showing that the communications were in furtherance of joint criminal activity, *United States v. Mendoza*, 574 F.2d 1373, 1379-81 (5th Cir. 1978), the adverse spousal testimony privilege may be asserted only by a testifying spouse, *Trammel*, 445 U.S. at 54.

To date, the five courts of appeal that have decided the issue are split on whether the "partners in crime" exception applies to the adverse spousal testimony privilege. *See United States v. Clark*, 712 F.2d 299, 301 (7th Cir. 1983) (adopting exception); *Trammel v. United States*, 583 F.2d 1166 (10th Cir. 1978) (adopting exception), affirmed on other grounds in *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906 (1980); *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1042 (9th Cir. 1997) (rejecting exception), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000) (rejecting exception); *In re Grand Jury Subpoena United States*, 755 F.2d 1022, 1025 (2d Cir. 1985) (rejecting exception), *vacated on other grounds sub. nom, United States v. Koecher*, 474 U.S. 133, 106 S.Ct. 1253 (1986); *Appeal of Malfitano*, 633 F.2d 276, 280 (3d Cir. 1980) (rejecting exception).

In declining to create a "partners in crime" exception, the Second, Third and Ninth circuits have focused on the fundamental purpose of the privilege—to protect the sanctity of marriage from the public spectacle of compelled adverse spousal testimony—and found that this purpose would be defeated by such exception. *See In re Grand Jury Subpoena*, 755 F.2d at 1027-28; *Malfitano*, 633 F.2d at 279 & n.5. Because the adverse spousal testimony privilege has ancient roots and protects highly important social interests, such as the right to marital privacy, the Second Circuit has cautioned that courts should "leave the creation of exceptions to the Supreme Court or to Congress." *In re Grand Jury Subpoena*, 755 F.2d at 1027-28. This Court, however, went to great lengths to affirm the Tenth Circuit's decision in *Trammel* on grounds other than a "joint crimes" exception, despite this being the basis for the Tenth Circuit's decision. *Id.* at 1026.

Thus far, the exception has not been applied in the Eleventh Circuit. *See United States v. Archer*, 733 F.2d 354, 359 n.3 (5th Cir.1984) (expressly reserving decision on this issue). However, the district court in this case, after finding that Knock and his wife were "partners in crime," followed the Seventh Circuit and applied the exception. (App. p. 38a). On Appeal, Knock argued that it was reversible error for the district court to compel Mrs. Knock's testimony by applying a "partners in crime" exception to the adverse spousal testimony privilege and urged the court to join the majority of other circuits in rejecting the exception. Further, Knock raised the important societal interests protected by the privilege, as articulated by this Court in *Trammel*, and argued that the creation of such an exception should be left to Congress or this Court.

In response to Knock's arguments, the court of appeals held that it "need not reach the district court's application of this exception because the Supreme Court has established that the adverse spousal witness privilege belongs to the testifying spouse and not the accused. (App. pp. 6a-7a, *citing Trammel v. United States*, 445 U.S. at 53). In doing so, the court of appeals impermissibly extended the holding of *Trammel*. Knock does not dispute that this Court in *Trammel* held that the adverse spousal testimony privilege may be asserted only by the witness spouse at trial. However, the *Trammel* Court did not hold, or even address, that the defendant/non-witness spouse lacks standing to raise a claim on *appeal* when, as here, the witness spouse properly objected at trial. Indeed, the Eighth Circuit has presumed standing in such circumstances. *See United States v. Smith*, 742 F.2d 398, 401 (8th Cir. 1984) (standing presumed for non-witness spouse to pursue claim on appeal); *United States v. Bad Wound*, 203 F.3d 1072, 1074-75 (8th Cir. 2000) (same). The Eighth Circuit's approach is logical where, as here, it is the defendant/non-witness spouse who has been prejudiced by virtue of the fact that his wife was improperly compelled to testify and introduce highly inflammatory evidence against him.

Accordingly, Petitioner respectfully submits that this Court should grant certiorari to resolve the split between the Eighth and Eleventh Circuit on the standing issue, and furthermore, to reach and resolve the two to three split amongst five circuits regarding the application of a "partners in crime" exception to the adverse spousal testimony privilege.

II.

CERTIORARI SHOULD BE GRANTED TO ANSWER THE QUESTION LEFT OPEN BY THIS COURT IN *U.S. V. COTTON*; WHETHER PROPERLY-PRESERVED *APPRENDI* ERROR CONSTITUTES STRUCTURAL ERROR UNDER *ARIZONA V. FULMINANTE*

Certiorari should be granted here because the Eleventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court; namely, whether properly-preserved *Apprendi* error constitutes structural error under *Arizona v. Fulminante*. (U.S. Sup. Ct. Rule 10.1(a)).

In *Arizona v. Fulminante*, the Court defined structural errors as involving rights "so basic to a fair trial that their infraction can never be treated as harmless error." 499 U.S. at 308, 111 S.Ct. 1264 (quoting *Chapman*, 386 U.S. at 23, 87 S.Ct. 828).

The Eleventh Circuit held in *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) that *Apprendi* error is not structural, and that even where objection to *Apprendi* error is raised below, the appropriate standard of review is "harmless error" under Fed.R.Crim.P. Rule 52(a). *Nealy* directs that in order to discern whether the error is harmless, a reviewing court should evaluate the evidence presented at trial. 232 F.3d at 830. The Eleventh Circuit affirmed *Nealy* in *United States v. Sanchez*, 269 F.3d 1250, 1272-1273 (2001), and followed *Nealy* and *Sanchez* in *United States v. Anderson*, 289 F.3d 1321 (11th Cir. 2002). *Anderson* held that *Apprendi* error is harmless if, "[N]o reasonable juror could have found the defendant guilty

without also finding that the specific quantity of drugs was involved." 289 F.3d at 1327.

This Court, however, has not resolved the issue of whether *Apprendi* error is structural, and therefore not susceptible to a harmless error analysis. This Court expressly left that question open in *United States v. Cotton*, 535 U.S. at 633, 122 S. Ct. at 1786. In *Cotton*, this Court analyzed the defendants' *Apprendi* claim under the "plain error" standard of Fed.R.Crim.P. Rule 52(b), because the defendants had not objected below. Under Rule 52(b), reviewing courts apply a four-part test: There must be (1) error, (2) that is plain, and (3) that affects substantial rights. If these three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. 535 U.S. at 633, 122 S. Ct. at 1786.

This Court cited to its prior decision in *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544 (1997), where it had explained that even structural errors are subject to Rule 52(b) analysis. 520 U.S. at 465-470, 117 S.Ct. 1547-1550. *Johnson* recognized that it might be true that if an error is structural it will always "affect substantial rights," but pointed out that there is no need to reach that question if the reviewing court determines that the claim fails on Rule 52(b)'s fourth prong. *Id.* In *Cotton*, this Court rejected the defendants' *Apprendi* claims on that basis, finding that on the facts before it, "[T]he error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." 535 U.S. at 633, 122 S. Ct. at 1786.

Here, unlike *Cotton*, defendants objected in the district court on *Apprendi* grounds to the imposition of their life sentences. By objecting below, Knock preserved the error, rendering it beyond the ambit of Rule 52(b) and that rule's fourth prong requirement. The error is therefore analyzed under Rule 52(a), and reversal is required if it affects the defendant's substantial rights. *See United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1778-1778 (1993).

This case therefore squarely presents the issue left open by Cotton. Knock respectfully submits that *Apprendi* error is structural and therefore always affects substantial rights. Where, as here, objection below properly preserves the issue, *Apprendi* error should be per se reversible.

III.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DOCTRINE OF "HARMLESS ERROR" SHOULD SHIELD THE ACTIONS OF A SENTENCING JUDGE WHO EXPLICITLY AND PURPOSELY REFUSES TO FOLLOW THE LAW AND THEN PURPORTS TO FIND HIS OWN "ERROR" IN DOING SO "HARMLESS."

Even if this Court determines that properly-preserved *Apprendi* errors are not in themselves structural errors (see Argument II, *supra*), certiorari should nonetheless be granted here because the Court of Appeals sanctioned the district court's extreme departure from the accepted and usual course of judicial proceedings, such as to call for an exercise of this Court's supervisory power. (U.S. Sup. Ct. Rule 10.1(a)).

This case was in a very unique posture at the time of sentencing. Absent a record like this one, a reviewing court could not assume that a district court intentionally "erred" rather than simply misapplied the law. The normal assumption must be that a district court is conscientiously applying the law. However, the district court here acknowledged on the record that a life sentence would be illegal under *Apprendi* but then imposed that sentence anyway after purporting to apply "harmless error" review to its own actions. (App. pp. 24a-34a).

Apprendi error is normally considered trial error. This makes analytical sense because *Apprendi* error is the failure to charge in the indictment, instruct the jury, and require a jury finding beyond a reasonable doubt as to drug quantity. Once the issue is before the appellate court, the sentence has been imposed, and that sentence would be legal but for those trial errors. The cohesion of this analytical framework is lost, however, when the district court usurps the appellate review function as the district court did here.

Here, at the time of sentencing, there had been no *trial error* under the charges set forth in the indictment. Knock was urging the district court not to commit *Apprendi* error by imposing an enhanced sentence on the basis of drug quantities that had not been found beyond a reasonable doubt by the jury.

The failure to instruct the jury regarding drug quantity, and the failure to require from the jury a finding beyond reasonable doubt as to drug quantity, were not *errors* at the time the district court issued its Order. Those failures merely meant that under *Apprendi*, Knock could only be sentenced to a maximum of five years on each of the two

drug convictions under the catch-all provision (21 U.S.C. § 841(b)). It was not until the *sentencing* in this case, when the district court imposed an enhanced sentence based upon drug quantity not proven to the jury, that error occurred. Without *trial* error, the harmless error analysis of *Nealy*, *Sanchez* and *Anderson*, *supra*, is inapplicable.

The important question here for the integrity of the judicial system, which merits this Court granting certiorari, is not whether a *reviewing court* can apply harmless error review to *Apprendi* error in cases where *Apprendi* was decided after trial but before sentencing. Of course it can. The determinative question is not, "At which stage of the proceedings was *Apprendi* decided?" but rather whether the district court committed a good-faith error as opposed to a result-oriented express disregard for the rule of law announced by this Court.

There may often be a multitude of interpretations and unanswered questions among lower courts in the wake of a decision like *Apprendi* that so radically alters the legal landscape. District court judges operating in good faith are bound to make honest mistakes especially in transitionary periods, and such judges are entitled to the deference accorded by application of the Fed.R.Crim.P. Rule 52(a) standard of review. But that is not what happened here. The district court explicitly acknowledged it was refusing to follow the law as required by this Court in *Apprendi*, and purported to find its own "error" in doing so harmless. (App. pp. 24a-34a). Such disregard for the law impugns the integrity of the judiciary and of the judicial process. This Court should grant certiorari to ensure

that the rule of law is respected, even when the result of doing so may be unpalatable to district court judges.

Prior to sentencing, Knock advised the district court that the only district court in the Eleventh Circuit to address this issue was in *United States v. Salery*, 119 F.Supp.2d 1268 (M.D.Al. 2000). In *Salery*, the court held that, *although arguably sufficient evidence was presented to support the drug quantity specified in the indictment*, the lack of a specific jury finding of such amount precluded sentences beyond the statutory maximum. *Id.* (emphasis added). Of significance, the court stated that "even if the error could be considered harmless error, however, *it is not appropriate for a district court to commit error simply* because it might be found to be harmless." *Id.* at 1272, n.3 (emphasis added).

The holding of *Salery* is consistent with the Advisory Committee Notes to Rule 52, which clearly state that harmless error analysis is reserved for *post*-judgment review:

> This rule is a restatement of existing law, 28 U.S.C. former § 391: On the hearing *of any appeal, certiorari, writ of error, or motion for a new trial*, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

Advisory Committee Note to FRCP 52(a).

Knock submits that even if this Court determines that *Apprendi* error is not normally structural, the error here constitutes structural error because the fundamental

requirement that district courts not purposefully refuse to apply controlling law is, "so basic to a fair trial that [its] infraction can never be treated as harmless error." *Arizona v. Fulminante*, 499 U.S. at 308 (quoting *Chapman*, 386 U.S. at 23).

CONCLUSION

For the foregoing reasons, Knock respectfully requests that certiorari be granted.

Dated: October 27, 2003

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